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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LINDA RHODES,

Appellant,

v.

MIROSLAVA GONZALEZ, as
Successor Trustee, etc.,

Respondent.

2d Civ. No. B280577
(Super. Ct. No. 15PR00467)
(Santa Barbara County)

Caroline J. Strutz created her Individual Trust (Trust) on April 3, 1991. Her son was the sole beneficiary. In 2013, Strutz amended the Trust to name her care custodian, Miroslava Gonzalez, as the sole beneficiary and successor trustee. Linda Rhodes, who is Strutz's goddaughter and niece, became the contingent beneficiary.

Donative transfers by dependent adults to their care custodians are subject to a presumption of fraud and undue influence. (Prob. Code, § 21380, subd. (a)(3).)¹ This presumption

¹ All statutory references are to the Probate Code.

may be overcome if the donative instrument is reviewed by an “independent attorney” and a Certificate of Independent Review is delivered to the transferor. (§ 21384, subd. (a).)

Strutz’s estate planning attorney, Michael S. Hardy, retained an “independent attorney,” Brian F. Simas, to advise Strutz concerning the change to her Trust. Although Simas delivered a Certificate of Independent Review, he used the wrong statutory form. (See former § 21351, subd. (b).) After Strutz’s death, Rhodes filed a petition challenging the validity of the Trust amendment. We must decide whether the presumption of fraud and undue influence applies under these circumstances.

Rhodes contends the Certificate of Independent Review is invalid as a matter of law because it does not substantially comply with the operative form prescribed by the Legislature in section 21384, subdivision (a).² The probate court found, following an evidentiary hearing, that “section 21384 requirements have been met and complied with in respect to the Certificate of Independent Review with Trustor (now decedent) . . . as it applies to the First Amendment to the . . . Trust.” Rhodes does not challenge the sufficiency of the court’s factual findings, and thus has forfeited that issue. Nonetheless, we conclude the law and substantial evidence support the court’s findings and affirm the order dated January 30, 2018.

FACTUAL AND PROCEDURAL BACKGROUND

The Trust originally provided that Strutz’s only son, Raymond, would inherit the entire trust estate upon her death. The Trust remained unchanged until October 9, 2013, when

² Barbara Platt, who is involved in similar litigation in another county, filed an amicus curiae brief supporting Rhodes’s position.

Strutz, at the age of 89, executed the First Amendment to the Trust, in which she disinherited her son and left her entire estate to Gonzalez, who was her care custodian between 2012 and 2015. Rhodes is listed as the contingent remainder beneficiary.

On September 27, 2013, Strutz's general physician, Ryan Allen, D.O., prepared a letter in which he stated that Strutz's "mental status will sometimes wane depending on her nutritional state and co morbid [*sic*] conditions such as recurrent [urinary tract infections]. She has been doing well as of late, particularly with her care giver support and improved nutritional status. [¶] In my opinion, she is currently in a mental state where she is capable of making her own financial and estate planning decisions."

On October 3, 2013, Hardy sent Strutz the proposed First Amendment to the Trust and related documents, including a proposed Certificate of Independent Review. Hardy advised Strutz that her "estate plan must be reviewed by an independent attorney as your . . . plan distributes your estate to your caretaker." Hardy informed Strutz that she would be meeting with Simas on October 9, 2013, at 9 a.m., for that independent review. Hardy also forwarded the same documents to Simas.

Simas counseled Strutz on October 9, 2013, for the purpose of complying with sections 21384 and 21380, which govern donative transfers to certain individuals, including care custodians. No one else was present during the counseling session, which lasted approximately 20 minutes. After the interview, Simas signed the Certificate of Independent Review, which contained language from former section 21351, subdivision (b) instead of from section 21384, subdivision (a). It appears that Simas signed the Certificate in the form previously prepared by Hardy and forwarded to both Simas and Strutz.

Simas performed similar independent reviews for six to eight other clients referred by Hardy. Simas did not specifically recall his interview with Strutz, but testified that his custom and practice was to decline to sign a Certificate of Independent Review “if he was to determine during the interview session that the person had a cognitive impairment or an issue at play with respect to capacity.” He also would decline to sign a Certificate if he believed the client “was under pressure to sign or to enter into any of the documents” under review or did not understand the documents or the impact of signing the documents.

Immediately after his interview with Strutz, Simas sent Hardy an e-mail, in which he stated: “I met with Caroline just now. Everything went well. Nice woman. Please find attached a scanned copy of the signed Certificate for your records. Original is in the mail.” Strutz then went to Hardy’s office, where she signed the First Amendment to the Trust and related estate planning documents. Simas believed that Hardy, as Strutz’s counsel, would deliver the signed Certificate of Independent Review to his client.

On October 27, 2014, Strutz resigned as trustee and Gonzalez became the successor trustee. Strutz died on July 11, 2015, and Gonzalez began distributing the Trust’s assets to herself. She took title to Strutz’s home, which she then sold, and withdrew \$398,363.88 from Strutz’s bank accounts. Rhodes claims the estate is worth at least \$800,000.

Rhodes filed a petition to (1) determine the validity of the Trust amendment, (2) impose a constructive trust and (3) award damages and other relief for wrongful taking and financial elder abuse. She later filed a first amended petition for instructions and orders suspending the trustee and requiring an accounting and a trustee bond. Among other things, Rhodes requested a

finding of a presumption of fraud or undue influence based on Simas's failure to use the updated Certificate of Independent Review form.

The probate court denied Rhodes's request. On December 1, 2016, it issued an order determining "[t]he Certificate of Independent Review signed by . . . Simas on October 9, 2013, under former . . . section 21351, substantially complies with the form prescribed for completing a Certificate of Independent Review under . . . section 21384(a)." The court noted that "[o]therwise, you're elevating form over substance."

Although the order determined the facial validity of the Certificate, it did not decide "any substantive issues concerning the validity of the document that may require an evidentiary hearing." The court explained: "This Order does not preclude either party from seeking a future determination as to the legal or factual adequacy of the representation or counsel provided by attorneys . . . Simas and . . . Hardy in connection with the validity of the subject Certificate of Independent Review." Rhodes appealed that order.

Rhodes's opening brief raises a single issue: "[C]an the 'independent attorney' use a legislatively-outmoded certificate of independent review under former . . . section 21351 and still substantially comply with the statutory certificate of independent review form for making gifts from a dependent adult to a care custodian under . . . section 21384?"

After reviewing the parties' briefs and the December 1, 2016 order, we questioned whether we had jurisdiction to hear the appeal. Under section 1304, subdivision (a), an appeal lies from "[a]ny final order" made under section 17200. The probate court's order denied Rhodes's request for an order finding that Gonzalez is presumed to have committed fraud or undue

influence under section 21380, but noted that “we will not [make] the complete determination of the validity of the certificate until we deal with the factual determination should there be any.”

In supplemental briefing, Rhodes reiterated her view that the December 1, 2016 order is an appealable final order. We were not persuaded. A determination by the probate court that the Certificate of Independent Review was substantively invalid would render an appeal regarding its facial validity moot. Rather than dismiss the appeal as premature, we issued an order on October 2, 2017, staying the appeal “to allow the [probate] court to hear such other and further evidence on the issue of the substantive validity of the Certificate of Independent Review as the parties may submit, which may include, but is not limited to, testimony from the attorneys involved in the preparation of the Certificate.”

Consistent with our order, the probate court held an evidentiary hearing on the issue of the validity of the Certificate of Independent Review. Rhodes called Simas as a witness and the parties stipulated to the admission of a declaration from Hardy. After considering Simas’s testimony and other admissible evidence, the court issued an order on January 30, 2018, finding that the “section 21384 requirements have been met and complied with in respect to the Certificate of Independent Review with Trustor (now decedent) . . . as it applies to the First Amendment to [the Trust].” The court noted that “[t]he effect of the Court’s findings and determination is that at this stage of proceedings, the presumption of fraud and undue influence set forth in . . . section 21380 is not applicable to the First Amendment to the . . . Trust document executed October 9, 2013 as this case progresses to further proceedings and trial.”

On June 22, 2018, we asked the parties to submit supplemental briefing regarding whether the January 30, 2018 order constitutes a final judgment, which is appealable, or an interlocutory decree, which is not appealable. Rhodes once again asserted that the December 1, 2016 order is the appealable order.

We lifted the stay of this appeal on January 4, 2019, and instructed Rhodes to augment the record with the reporter's transcript of the evidentiary hearing and any other evidence and documents leading to the January 30, 2018 order. Rhodes complied with that directive, but neither she nor Gonzalez accepted our invitation "to file supplemental letter briefing discussing the probate court's . . . order of January 30, 2018."

DISCUSSION

Appealability

The probate court's January 30, 2018 order resolves the issues concerning the validity of the Certificate of Independent Review and thus is an appealable final order.³ (§ 1304, subd. (a).) Even if the order were not appealable, we have discretion to treat a failed appeal as a petition for writ of mandate (*Olson v. Cory* (1983) 35 Cal.3d 390, 400-401; *Quintanar v. County of Riverside* (2014) 230 Cal.App.4th 1226, 1232), and we would do so in this case.

Standard of Review

We independently interpret the relevant statutes and apply the substantial evidence standard to the probate court's factual

³ Rhodes's notice of appeal is from the December 1, 2016 order. As previously noted, that appeal was premature. In the interests of justice and absent any prejudice to Gonzalez, we construe the appeal from that order as taken from the January 30, 2018 order. (*Vibert v. Berger* (1966) 64 Cal.2d 65, 67-68; *Vitkievich v. Valverde* (2012) 202 Cal.App.4th 1306, 1310, fn. 2.)

findings. (*Martinez v. Vaziri* (2016) 246 Cal.App.4th 373, 382; *In re L.L.* (2017) 13 Cal.App.5th 1302, 1310.) We conclude the probate court's finding that the Certificate of Independent Review complies with section 21384 is reviewed for substantial evidence. Such inquiry is necessarily fact-bound and requires an evaluation of the confidentiality of the consultation, the certifying attorney's impartiality, and the transferor's understanding as to the nature of the intended bequest and his or her free will in making it.

Accordingly, we view the record in the light most favorable to the prevailing party and resolve all conflicts and give the benefit of all reasonable inferences in support of the order. (*Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189; *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.) We do not evaluate the credibility of the witnesses or otherwise reweigh the evidence. (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514-515.)

*Rhodes Forfeited Any Challenge to the
Sufficiency of the Probate Court's Factual Findings*

Rhodes's position is that this appeal may be resolved as a matter of law. She contends that a Certificate of Independent Review erroneously completed under former section 21351 should be disregarded because it does not substantially comply with the operative form prescribed under section 21384.

The problem with this contention is that it does not consider the probate court's factual findings. The court did originally rule that that the Certificate of Independent Review facially complied with section 21384, but reserved issues regarding the independent attorney's substantive compliance with that statute. After hearing the evidence, the court found

that the “section 21384 requirements have been met and complied with,” notwithstanding the use of an outdated form.

An appellant attempting to demonstrate that an order was not based on sufficient evidence must, in his or her brief, marshal all the record evidence relevant to the claim and affirmatively show its insufficiency under the substantial evidence standard. Rhodes’s failure to proceed in this manner forfeited any claim regarding the sufficiency of the evidence. (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 415-416.)

*The Probate Court Did Not Err in Determining the
Certificate of Independent Review Was Valid*

Notwithstanding Rhodes’s decision to forego challenging the probate court’s factual findings, we conclude the law and substantial evidence support the court’s determination that the Certificate of Independent Review was facially and substantively valid, thereby overcoming the presumption of fraud or undue influence set forth in section 21380.

Former section 21350 precluded care custodians “from being beneficiaries of testamentary transfers from dependent adults to whom they provide care services, as well as barring similar transfers to other ‘disqualified persons.’” (*Estate of Winans* (2010) 183 Cal.App.4th 102, 113.) The ban is avoided, however, if a “certificate of independent review’ is prepared with respect to the transfer.” (*Id.* at p. 114.)

“The statutory bar of [former] section 21350 supplements the preexisting common law doctrine that a presumption of undue influence arises when a person in a confidential relationship with the testator actively participates in procuring a will and benefits unduly under it. [Citation.] The statute’s purpose, evident on its face is ‘to prevent unscrupulous persons in fiduciary relationships from obtaining gifts from elderly persons

through undue influence or other overbearing behavior.’
[Citation.] In enacting the statute, the Legislature sought to strike a balance between ‘protecting prospective transferors from fraud, menace, or undue influence, while still ensuring the freedom of transferors to dispose of their estates as they desire’” (*Estate of Winans*, *supra*, 183 Cal.App.4th at pp. 113-114.)

In 2010, the Legislature repealed section 21350 et seq., effective January 1, 2014. (*Jenkins v. Teegarden* (2014) 230 Cal.App.4th 1128, 1136.) At the same time, it enacted section 21380 et seq., effective January 1, 2011. (*Jenkins* at p. 1136.) As noted in *Jenkins*, the Legislature essentially “reenact[ed] . . . section 21350 et seq. as . . . section 21380 et seq., *with only minor changes*.” (*Id.* at p. 1138, italics added.)

It is undisputed that section 21380 et seq. applied at the time Simas interviewed Strutz on October 9, 2013. When Simas signed the Certificate of Independent Review, he did not follow the format specified in section 21384, subdivision (a). His Certificate substantially tracked the language in former section 21351, subdivision (b): “I, BRIAN F. SIMAS, have reviewed the FIRST AMENDMENT TO THE DECLARATION OF TRUST ESTABLISHING THE CAROLINE J. STRUTZ INDIVIDUAL TRUST, LAST WILL AND TESTAMENT, DURABLE POWER OF ATTORNEY AND NOMINATION OF CONSERVATOR and ADVANCE HEALTH CARE DIRECTIVE, and counseled my client, CAROLINE J. STRUTZ, on the nature of the transfer, or transfers, of property to MIROSLAVA GONZALEZ contained in such instruments. I am so disassociated from the interest of the transferee as to be in a position to advise my client impartially and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in such instruments that otherwise might be invalid under Section

21350 of the Probate Code are valid because such transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.”

Section 21384, subdivision (a) provides that a donative transfer is not subject to the presumption of fraud or undue influence in section 21380 if the instrument is reviewed by an independent attorney and an original Certificate of Independent Review is delivered to the transferor in “substantially the following form: [¶] I, [attorney’s name], have reviewed [name of instrument] and have counseled the transferor, [name of transferor], on the nature and consequences of any transfers of property to [name of person described in section 21380] that would be made by the instrument. [¶] I am an ‘independent attorney’ as defined in Section 21370 of the Probate Code and am in a position to advise the transferor independently, impartially, and confidentially as to the consequences of the transfer. [¶] On the basis of this counsel, I conclude that the transfers to [name of the person described in Section 21380] that would be made by the instrument are not the product of fraud or undue influence.”

Rhodes argues the Certificate of Independent Review was defective in form because Simas completed only one certificate for four separate instruments, and did not separate the language into three paragraphs as required by section 21384, subdivision (a). Rhodes cites no authority suggesting that a separate Certificate must be prepared for each instrument under review. In addition, section 21384 only requires that the Certificate be “substantially” in the form set forth in subdivision (a). It does not require that the Certificate be in the exact same form. A Certificate containing the language in one paragraph, as opposed to three, would still be “substantially” in the form prescribed by the statute. As stated in *Southern Pac. Transportation Co. v.*

State Bd. of Equalization (1985) 175 Cal.App.3d 438, 442, “[s]ubstantial compliance . . . means *actual* compliance in respect to the substance essential to every reasonable objective of the statute.’ [Citation.] Where there is compliance as to all matters of substance[,] technical deviations are not to be given the stature of noncompliance. [Citation.] Substance prevails over form.” (Accord *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 72.)

The question, therefore, is whether the Certificate of Independent Review was substantively inadequate. The current statutory scheme contains only two relevant substantive changes. First, section 21384, subdivision (a) provides that an independent attorney who counsels the transferor regarding a donative transfer to a care custodian must do so “out of the presence of any heir or proposed beneficiary.” Second, section 21370 revises the definition of “independent attorney,” as used in section 21384, to mean “an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue under this part, and who would not be appointed as a fiduciary or receive any pecuniary benefit as a result of the operation of the instrument containing the donative transfer at issue under this part.”

Rhodes contends the Certificate of Independent Review was invalid because Simas presumably conducted the interview in accordance with former section 21351 which, unlike section 21384, did not require Simas to meet with Strutz, as the transferor, outside the presence of any heir or proposed beneficiary. The evidentiary record confirms, however, that no one other than Simas and Strutz was present at the interview, and section 21384, subdivision (a) did not require Simas to certify

that the interview was outside the presence of any heir or beneficiary.

Next, Rhodes argues the Certificate of Independent Review was invalid because it contained an outdated definition of the term “independent attorney.” Section 21384, subdivision (a) requires the reviewing attorney to certify that he or she is “an ‘independent attorney’ as defined in Section 21370” Instead, Simas certified, based on the language in former section 21351, subdivision (b), that he was “so disassociated from the interest of the transferee as to be in a position to advise my client impartially and confidentially as to the consequences of the transfer.”

The probate court found, based on the evidence, that Simas qualified as an “independent attorney” under section 21384, subdivision (a). Although the court did not reference the three requirements for an “independent attorney” set forth in section 21370, Simas testified that he had a history of preparing Certificates of Independent Review for Hardy’s clients, and that Hardy arranged for Strutz to meet with Simas for that purpose. Before conducting the independent review, Simas confirmed he had no conflict with the designated beneficiaries, trustees and trustor. Simas had no knowledge of Gonzalez, other than the fact that “she was [Strutz’s] caretaker.” Simas did not receive any pecuniary benefit aside from the \$150 to \$275 he was paid for the review. Nor was there any evidence that Simas was or will become a fiduciary. Accordingly, substantial evidence supports the finding that Simas was an “independent attorney” under section 21384, subdivision (a).

Rhodes maintains that the Certificate of Independent Review was nonetheless invalid because a Certificate executed under former section 21351, subdivision (b) cannot substantially

comply with the form required by section 21384, subdivision (a) because it fails to *certify* that the reviewing attorney is “an ‘independent attorney’ as defined in Section 21370.” (*Ibid.*) She claims this change in the law demonstrates the Legislature’s determination that the old form did not sufficiently establish the independence of the reviewing attorney.

The legislative history does not support this view. The purpose of section 21384, subdivision (a) was to change the definition of “independent attorney” to allow “the attorney who drafted the instrument to also certify that a gift to a care custodian is not the product of fraud or undue influence, provided the attorney meets the definition of an ‘independent attorney’ with the requisite degree of disassociation from the beneficiary. This change . . . should help the transferors complete such gifts, without the need for the services of two different attorneys.” (Assembly Committee on Judiciary, Analysis of Senate Bill No. 105, as amended June 22, 2010 (2010-2011), pp. 8-9.)

Thus, under section 21384, subdivision (a), Hardy could have served as the “independent attorney,” provided he had the requisite degree of disassociation from Gonzalez. Instead, he arranged for another attorney, Simas, to conduct the independent review. The Certificate signed by Simas certified that he was “so disassociated from the interest of the transferee [Gonzalez] as to be in a position to advise my client impartially and confidentially as to the consequences of the transfer.” As the legislative history confirms, this language was sufficient to substantially comply with section 21384, subdivision (a), particularly for an attorney who did not draft the donative instrument. Because the drafting attorney is likely to have an ongoing attorney-client relationship with the transferor, it would not be uncommon for the attorney to also have some type of relationship with the beneficiary, a

possible role as a fiduciary or a pecuniary interest in the transfer. In that case, he or she would be unable to also act as the independent attorney. The Legislature addressed this concern, but there is nothing to suggest that a certification by a non-drafting attorney would not substantially comply with section 21384, subdivision (a), provided he or she is disassociated from the beneficiary. (See Assembly Committee on Judiciary, Analysis of Senate Bill No. 105, as amended June 22, 2010 (2010-2011), pp. 8-9.)

Moreover, not only does substantial evidence support the probate court's finding that Simas qualified as an "independent attorney" under section 21370, but a certification as to that fact also was unnecessary. Hardy, as Strutz's estate planning attorney, referred her to Simas strictly for the independent review. That was the first and only time Strutz and Simas met with each other, and Strutz undoubtedly was aware that Simas had no relationship with Gonzalez, had no pecuniary interest in the Trust amendment and would not be serving as a fiduciary. Under these specific facts, it would be inequitable to conclude that the Certificate of Independent Review did not "substantially" comply with section 21384, subdivision (a).

Finally, Rhodes contends the Certificate of Independent Review was procedurally defective because section 21384, subdivision (a) required Simas, as the reviewing attorney, to deliver to Strutz, as the transferor, the original Certificate prepared under that statute. As previously discussed, the law and substantial evidence support the trial court's finding that the Certificate signed by Simas complied with section 21384. The record confirms the original Certificate was mailed to Hardy, and it is reasonable to infer that it was subsequently delivered to his client.

DISPOSITION

The probate court's order dated January 30, 2018 is affirmed. Respondent shall recover her costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Timothy J. Staffel, Judge
Superior Court County of Santa Barbara

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